Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-588

STANLEY JERRY PIASCIK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

EPHRAIM MARGOLIN,
445 Sutter Street, Suite 501,
San Francisco, California 94108,
Telephone: (415) 421-4347,
Attorney for Petitioner,
Stanley Jerry Piascik.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

Table of Authorities Cited

Statutes

est exclusio alterius,[1] and of the "presumption that a proviso 'refers only to the provision to which it is attached.'" *United States v. McClure,* 305 U.S. 472, 478, 83 L.Ed. 296, 59 S.Ct. 335 (1939).

Even if waiver of the provisions of the Court Reporting Act in a criminal case were possible, such a waiver would not constitute waiver of the right to object to prosecutorial misconduct. In this case "The unavailability of a full transcript makes it impossible for us to determine whether the errors were harmless . . ." *Parrott v. U.S.,* 314 F.2d 46, 47 (10 Cir. 1963), and it cannot be denied that if the prosecutor made the statement asserted in closing arguments, his act was clear misconduct. See *Berger v. U.S.,* 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). The Government suggests that it was proper for the Court of Appeals nonetheless to reach "an essentially factual conclusion that the remark did not contribute to petitioner's conviction." (Note 9, Respondent's Brief at 6). If reversal is not called for in this case, then such a factual conclusion should be made by the trial court on remand, and not by the Court of Appeals on an incomplete record.

---

2. PROHIBITIONS AGAINST DOUBLE JEOPARDY AND DOUBLE PUNISHMENT WERE VIOLATED IN THIS CASE

As established in *Brown v. Ohio,* ..... U.S. ....., 97 S.Ct. 2221, ... L.Ed.2d ..... (1977), conviction of one

[1]See, *e.g., National Railroad Passengers Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453, 458, 38 L.Ed.2d 646, 94 S.Ct. 690 (1974).

offense precludes conviction of either a lesser-included or greater offense, and precludes conviction of any other offense unless "each statute requires proof of an additional fact which the other does not." 97 S.Ct. at 2226. (Emphasis added.) It is not disputed that in the present case the "concealment" consisted of the petitioner's failure to state that he had acquired the Mercedes abroad. Consequently, having proven its case with respect to the "smuggling" charge (18 USC 545), the charge of "entry of goods by means of false statements" did not "require proof of an additional fact." Conviction of violation of both 18 USC 542 and 18 USC 545 was therefore improper.[2]

---

3. OTHER MATTERS RAISED IN THE PETITION ARE HEREIN REAFFIRMED

Petitioner reaffirms the statement of the case and argument in the petition with respect to matters not otherwise discussed in this brief. In omitting further argument petitioner is constrained by Rule 24's requirement that reply briefs be limited to matters first raised in the briefs in opposition; as the Government's remaining assertions are insubstantial or depend only upon a record which speaks for itself, they require no reply.

[2]There is a typographical error in the third to last line on page 15 of the petition which might lead to confusion. On that line, "18 USC Sec. 542" should be replaced by "18 USC Sec. 545."

CONCLUSION

For the foregoing reasons, the writ should be granted and the decision of the Ninth Circuit Court of Appeals reversed, with this Court granting the remedies requested in the petition.

Respectfully submitted,

EPHRAIM MARGOLIN,

Attorney for Petitioner,

Stanley Jerry Piascik.

Dated: February 6, 1978.